



In the Matter of:

**Disputes concerning the payment  
of prevailing rates by:**

**STAR BRITE CONSTRUCTION  
COMPANY, INC.; KOSTAS SMILIOS,  
President**

**ARB Case No. 98-113**

**Proposed debarment for labor standards  
violations by:**

**(Formerly ALJ Case  
No. 97-DBA-12)**

**STAR BRITE CONSTRUCTION COMPANY,  
INC.; KOSTAS SMILIOS, President**

**DATE: June 30, 2000**

**With respect to Laborers and Mechanics  
employed by the contractor on Contract No.  
F28609-92-C-0020, McGuire Air Force Base,  
Wrightstown, New Jersey.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Respondents-Petitioners:*

Thomas J. Hirsch, Esq., *Ocean, New Jersey*

*For the Complainant:*

Leif G. Jorgenson, Esq., Douglas J. Davidson, Esq., Steven J. Mandel, Esq.,  
Henry J. Solano, Esq., *U.S. Department of Labor, Washington, D.C.*

**FINAL DECISION AND ORDER**

This proceeding is before the Administrative Review Board pursuant to the Davis-Bacon Act (DBA or the Act), 40 U.S.C. §276a *et seq.* (1994) and the regulations at 29 C.F.R. §§6.34, 7.1(b)(1999). In this Petition for Review, Star Brite Construction Company, Inc. (Star Brite) and its president, Kostas Smilios (Smilios)<sup>1/</sup> – a construction contractor holding a Federal construction contract and alleged by the Administrator to have committed violations of Federal procurement law

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<sup>1/</sup> In this final decision and order, Petitioners Star Brite and Smilios are referred to collectively as Star Brite.

– raise four principal issues for consideration. The first is whether Petitioners were properly found by the ALJ to be liable for payment of \$15,290.43 in back wages assessed as owing to eight employees. Second, Petitioners contend that the ALJ improperly found them responsible for falsifying payroll records and submitting them to a Federal contracting agency and, based thereon, that they should be debarred from receiving any Federal contracts or subcontracts for a period of three years. Third, Star Brite challenges the ALJ’s determination that Petitioners’ defense was not prejudiced by delay between the time of the investigation and the time that the administrative hearing was conducted. Fourth, Star Brite alleges that the ALJ prejudiced their defense in making certain pre-hearing discovery rulings and in the handling of certain evidentiary issues at hearing.

Petitioners’ construction contract was subject to the prevailing wage requirements of the Davis-Bacon Act (requiring payment of locally prevailing wages and fringe benefits to laborers and mechanics employed on Federal construction projects) and the Department of Labor’s regulations implementing the Act at 29 C.F.R. Parts 1, 3, and 5 (1999). An investigator employed by the U. S. Department of Labor’s Wage and Hour Division conducted an inquiry into Star Brite’s compliance with the provisions of the Act and the regulations on the work being performed on its Federal construction contract. Violations of the Act’s wage and record keeping requirements were reported at the conclusion of the investigation, and the Administrator brought this administrative proceeding seeking restitution of back wages and debarment.

A Department of Labor Administrative Law Judge (ALJ) conducted an administrative hearing to determine the propriety of the allegations concerning back wages and debarment pursuant to 29 C.F.R. §6.30. After the hearing, the ALJ issued a Decision and Order (D. and O.) on March 5, 1998, finding that the Administrator’s back wage allegations were largely supported by the record evidence and, further, that Star Brite was guilty of the charged record keeping violations. Accordingly, the ALJ found Star Brite liable for \$15,290.43 in back wages and also directed that Star Brite and Smilios be debarred from Federal contracting for a period of three years. Star Brite and Smilios appealed the ALJ’s adverse determinations to this Board, which has jurisdiction pursuant to the Act and the implementing regulations at 29 C.F.R. §§6.57 and 7.1 (1999).

We have thoroughly reviewed the briefs or statements of the parties and the record compiled in the administrative hearing below and conclude that the ALJ’s findings and conclusions are in accordance with the Act and the regulations. Accordingly, for the reasons set forth below, we deny the Petition for Review and affirm the ALJ’s D. and O. of March 5, 1998.

## **BACKGROUND**

Smilios is the President and sole shareholder of Star Brite and has personally been involved in performing public contracts since 1975. T. 750-753.<sup>2/</sup> Star Brite has been in business since 1985

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<sup>2/</sup> Abbreviated reference to documents contained in the record are:

Transcript of Hearing	T.
Plaintiff’s Exhibit	PX

(continued...)

and performed some 10 to 15 government contracts in the three years prior to the McGuire Air Force Base (AFB) contract at issue in this case. T. 751-753. On September 30, 1992, the United States Air Force (USAF) awarded a contract for the renovation of two buildings at McGuire AFB, located in Wrightstown, New Jersey, to Star Brite. Plaintiff's Exhibit (PX) 1. Star Brite's work on the project consisted of demolition of walls and duct work; installation of windows; and plumbing. T. 123-124; 244-5; 306; 755-757. Construction work commenced in November 1992 (PX 6) and was completed in April 1995, T. 878. The contract was subject to the prevailing wage labor standards provisions of the Act. *See* PX 1.

An investigator employed by the Wage and Hour Division conducted a review of Petitioners' performance on the contract in order to determine compliance with the DBA's provisions. After completion of the investigation, the investigator charged that Star Brite and Smilios failed to pay proper prevailing wages to five of its employees and failed to pay any wages at all to four other workers on the contract. These allegations of prevailing rate underpayment, alleged the Wage and Hour Division, resulted in nine employees being owed \$20,799.77.<sup>3/</sup> Moreover, the Wage and Hour Division charged that Petitioners falsely certified and under reported to the USAF the numbers of hours employees worked on the construction contract in order to feign compliance with the prevailing wage requirements of the Act and the regulations.

An administrative hearing was conducted before the ALJ from October 22-24, 1997. At the hearing, the ALJ received documentary evidence from both the Administrator and the Petitioners. Additionally, the Wage and Hour Division's investigator, eight of the nine affected employees, and USAF contracting representatives testified for the Administrator. Petitioners presented testimony by Kostas Smilios, Gerrie Lassman (Star Brite's bookkeeper), Kathleen DeMito (a USAF contracting officer), Mario Buludis (Star Brite's plumbing subcontractor on the contract), and Joseph Pellegrino (Star Brite's construction supervisor for the McGuire AFB project).

As noted, the ALJ issued his decision and order on March 5, 1998, concluding that the testimony of the Star Brite employees (taken with certain documentary evidence) was credible, mutually corroborative, and supported the claimed amounts of back wages for eight of the nine Star Brite workers.<sup>4/</sup> D. and O. at 3, 4. The ALJ also found as fact that Petitioners had falsified their certified payroll records, based on discrepancies between the certified payrolls and Petitioners' in-house payroll records and an employee's record of work hours, a record which was maintained for the purpose of reporting work hours to the Star Brite business office. D. and O. at 5. Given the findings that Star Brite violated the DBA and the implementing regulations by underpaying required

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<sup>2/</sup>(...continued)

Petitioners' Brief in Support  
of Petition for Review

Pet'r Brf.

<sup>3/</sup> The amount claimed by the Administrator to be due as back wages was later reduced to \$18,814.51.

<sup>4/</sup> The ALJ rejected the Administrator's back wage claim made on behalf of William Knecht, whom the ALJ found to be a subcontractor, based on his testimony. D. and O. at 5. The Administrator did not appeal this determination.

prevailing wages and by submitting falsified certified payrolls, the ALJ concluded that debarment from government contracting was required. *Id.* at 7.

Finally, the ALJ concluded that Petitioners had failed to demonstrate that their defense had been prejudiced by the delay between completion of the Wage and Hour Division's investigation and the time the administrative hearing was conducted. *Id.* at 8. The ALJ did not address Petitioners' contention (presently before us) that their defense had been prejudiced by some of the ALJ's evidentiary rulings.

## DISCUSSION

### A. *Jurisdiction and standard of review*

This Board has jurisdiction, *inter alia*, to hear and decide appeals taken from ALJs' decisions and orders concerning questions of law and fact arising under the DBA (and numerous related Acts incorporating DBA prevailing wage requirements; *see* 29 C.F.R. §5.1). 29 C.F.R. §7.1(b). In accordance with the Administrative Procedure Act, the Board, in reviewing an ALJ's decision, acts with "all the powers [the Secretary] would have in making the initial decision. . . ." 5 U.S.C. §557(b) (1994); *see also* 29 C.F.R. §7.1(d) ("In considering the matters within the scope of its jurisdiction the Board shall act as the authorized representative of the Secretary of Labor. The Board shall act as fully and finally as might the Secretary of Labor concerning such matters.") Thus, "the Board reviews the ALJ's findings *de novo*." *Sundex, Ltd. and Joseph J. Bonavire*, ARB Case No. 98-130, Dec. 30, 1999, slip op. at 4 and cases cited therein.

### B. *The merits of Star Brite's Petition for Review*

#### 1) **Prevailing wage violations**

Central to the question of whether the ALJ properly determined the amounts of back wages owed employees is the underlying determination that the employees' testimony was credible and mutually corroborative. Petitioners exhaustively argue that the amounts of wages determined due are in error because the ALJ failed to appropriately view their testimony. *See* Pet'r Brf. at 4-34.

Specifically, the ALJ found the testimony of employees "[Ken and Steve] Senerchias and Rekeda credible and sufficiently consistent relative to their claim of hours and days worked, type of job performed, and actual pay." D. and O. at 3; footnote omitted.<sup>5/</sup> In addition to the credible and mutually supportive testimony of the employees found to be due back wages, the ALJ placed special

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<sup>5/</sup> The omitted footnote refers to the testimony of Star Brite's supervisor on the site, Joseph Pellegrino, who testified that Steve Senerchia and his fellow workers wasted time while working on the project. *See* T. 904; 920-928; 939-942. The ALJ dismissed this testimony as not relevant to the defense, stating that it suggested "a confirmation, rather than refutation, of hours worked as testified to by these employees. That these employees may have been wasting time, does not mean that they were not spending time on the job, as claimed by them!" D. and O. at 3, n. 8; emphases in original.

significance on a calendar (maintained by Steve Senerchia<sup>6/</sup>) which further supported the claimed days and daily hours worked by Ken and Steve Senerchia (D. and O. at 3) as well as those for employees Rekeda and Tilton (*Id.* at 4).

Aside from the foregoing employees, the Administrator also made back wage claims on behalf of four other workers who testified that they performed work on the project as plumbers. The ALJ specifically found the testimony of these four workers (who also testified that they received no wages whatsoever for their work) was “credible and generally corroborative of each other.” *Id.* at 4.

This Board has endorsed the general principle that where a decision rests upon credibility findings made by a trier-of-fact, we will not reverse the decision in the absence of clear error. *Sundex, Ltd., supra*, slip op. at 4-6. This decision follows the lead of a long line of decisions rendered pursuant to the DBA by our predecessor, the Wage Appeals Board (WAB).<sup>7/</sup> This approach to appellate review is well founded; as explained by the WAB in one case embracing the “clear error” doctrine:

it must be remembered that the ALJ heard and observed the witnesses during the hearing. It is for the trial judge to make determinations of credibility, and an appeals body such as the Wage Appeals Board should be loathe to reverse credibility findings unless clear error is shown.

*Homer L. Dunn Decorating, Inc.*, WAB Case No. 87-03, Mar. 10, 1989, slip op. at 3. *Accord*, *Permis Construction Corporation*, WAB Case No. 88-11, July 31, 1991, slip op. at 4 (“[T]he Board is reluctant to set aside an ALJ’s findings of fact or credibility determinations absent clear error. . . .”); *Energy Engineering and Controls, Inc.*, WAB Case No. 92-19, Mar. 31, 1993, slip op. at 5 (Citing *Milnor Construction Corporation*, WAB Case No. 91-21, Sep. 12, 1991, slip op. at 4: “The ALJ is in the unique position to judge the quality of testimony and the demeanor of witnesses during a hearing. In the absence of clear error on the part of an ALJ, the Board is reluctant to set aside ‘credibility resolutions and factual findings and the weight [] accorded to the record evidence.’”).

The Supreme Court has long sanctioned this approach to appellate review by administrative agencies. In *Universal Camera v. NLRB*, 340 U.S. 474 (1950), the Court quoted from a report of the Attorney General’s Committee on Administrative Procedures and made the following explication of the “clear error” principle of appellate review of findings of fact and credibility of witnesses:

Conclusions, interpretations, law and policy should of course, be open to full review. On the other hand, on matters which the hearing

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<sup>6/</sup> It is undisputed that for some of his hours on the project, Steve Senerchia acted in the role of Star Brite’s on-site manager and maintained his and the other employees’ hours of work on the calendar. The ALJ found credible Steve Senerchia’s testimony that his hours of work were spent as a laborer (75%), carpenter (10%), and supervisor (15%). D. and O. at 3.

<sup>7/</sup> The WAB issued final agency decisions pursuant to the Act from 1964 until the establishment of this Board in 1996.

commissioner, having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown.

*Id.* at 494.

In the case before us, the simple fact of the matter is that the ALJ made specific findings that the testimony of Steve and Ken Senecheria and Rekeda was credible, as well as being supported by Senecheria's calendar (maintained contemporaneously with construction on the project) which showed days and daily hours worked by these three employees as well as one non-testifying employee, Tilton. We have reviewed the record including the transcript of three days of hearing and find no basis to conclude that the ALJ committed clear error in choosing to credit the testimony of the Senecherias, Rekeda, and the four plumbing workers. Petitioners' argument that the ALJ should not have found these witnesses to be credible does not rise to the level of demonstrating clear error, and we will not disturb the ALJ's findings of fact, given that his findings were largely based on his determinations of the credibility of the witnesses.

Whether the ALJ properly found that back wages were due the four workers (Graef, Ferrin, Schenkel, and Tencza) who performed plumbing work on the project presents another issue. Petitioners do not argue that these individuals were properly paid the required prevailing rate for plumbers; they were, in fact, paid nothing by Star Brite for the hours they worked on the McGuire AFB contract. Star Brite contends that these workers were not Star Brite employees, but were, in fact, employees of a subcontractor. Thus, Star Brite argues that it was not required to pay the workers, since they were not directly employed by Star Brite. We reject this argument as baseless.

Even if the four plumbing crew workers were employees of a subcontractor, it is clear that the Act requires that Star Brite – as the prime contractor – is ultimately responsible for payment of prevailing rates to all workers on the contract. The DBA in part mandates that

the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, . . . the full amount . . . , *regardless of any contractual relationship which may be alleged to exist between the contractor, subcontractor and such laborers and mechanics.* . . .

40 U.S.C. §276a; emphasis added. Thus, under the DBA it is simply not relevant whether the four employees on the plumbing crew were employed by a subcontractor to Star Brite or were in fact directly employed by Petitioners. The fact that the workers were engaged in construction of the McGuire AFB project triggered their coverage under the prevailing wage provisions of the Act; lack of a traditional employee/employer relationship between Star Brite and these workers did not absolve Star Brite from the responsibility to insure that they were compensated in accordance with the requirements of the Act. *See Thomas J. Clements, Inc.*, WAB Case No. 84-12, Jan. 25, 1985 (affirming ALJ decision holding contractor responsible for payment of prevailing wages to alleged independent contractors).

The evidence of prevailing wage underpayments presented by the Administrator was clearly sufficient to establish the fact that Star Brite committed wage violations of the Act. Under long established precedent, the WAB has held that where an employer has failed to maintain accurate records of hours worked and wages paid, application of the principles set forth in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), is appropriate to determine back wage claims arising under the DBA and its related Acts. As the WAB explained, under *Mt. Clemens*:

an employee who seeks to recover unpaid wages “has the burden of proving that he performed work for which he was not properly compensated.” 328 U.S. at 687.

However, where an employer’s records are inaccurate or incomplete, employees are not to be penalized by denying them back wages simply because they cannot prove the precise amount of uncompensated work. In such circumstances, an employee meets his burden “if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.” 328 U.S. at 687. The employer then has the burden to demonstrate the precise number of hours worked or to present evidence sufficient to negate “the reasonableness of the inference to be drawn from the employee’s evidence.” 328 U.S. at 688. In the absence of such a showing, the court “may then award damages to the employee, even though the result be only approximate.” *Id.* Furthermore, *Mt. Clemens Pottery* provides specific guidance on the responsibilities of the trier of fact: “Unless the employer can provide accurate estimates [of hours worked], it is the duty of the trier of facts to draw whatever reasonable inferences can be drawn from the employees’ evidence . . . .” *Id.* at 693.

*Apollo Mechanical, Inc.*, WAB Case No. 90-42, Mar. 13, 1991, slip op. at 2-3. *See also P.B.M.C., Inc.*, WAB Case No. 87-57, Feb. 8, 1991; *Tratoros Construction Corp.*, WAB Case No. 92-03, Apr. 28, 1993, slip op. at 6.

Here, in the absence of accurate employer records, the ALJ properly credited the testimony of the workers who testified that they had not been paid the required prevailing rates on the McGuire AFB contract. The testimony was also supported by the calendar which recorded the hours worked on the project. Given the fact that Star Brite failed to maintain accurate records of hours worked and wages paid, the ALJ was fully justified in basing his findings on the testimony of the employees, as corroborated by Steve Senecheria’s calendar.

## **2) Debarment**

In addition to the provisions requiring payment of prevailing wages, the DBA provides for the further sanction of debarment, *i.e.* placement of certain violators’ names on a list of persons and

firms ineligible to receive federal contracts and subcontracts for a period of three years. Debarment under the Act is mandated for those “persons or firms . . . found to have *disregarded their obligations to employees* and subcontractors.” 40 U.S.C. §276-2(a); emphasis supplied. The Department of Labor’s regulations implementing the DBA reemphasize and mirror the Act’s language requiring debarment for those contractors found to have disregarded their obligations to either subcontractors or employees. 29 C.F.R. §5.12(a)(2).

While neither the Act nor the regulation defines the term of “disregard” of obligations, we have endorsed the principle – as long interpreted by the WAB – that the term encompasses at least the underpayment of prevailing wages coupled with the submission of falsified certified payrolls which masks the underpayments. *Sundex, Ltd., supra* at 7. See also *Marvin E. Hirschert*, WAB Case No. 77-17, Oct. 16, 1977; *Howell Construction, Inc.*, WAB Case No. 93-12, May 31, 1994.

In this case, the ALJ found that in addition to underpaying certain of its employees on the project, Star Brite also submitted certified payrolls to the contracting agency that had been falsified to feign compliance with the DBA prevailing wage requirements. D. and O. at 5-6. Substantial probative evidence (including the employee testimony accepted as credible and establishing wage underpayments, as well as documentary evidence) supports the ALJ’s findings and recommended debarment order. In short, the testimony of employees Steve and Ken Senecheria and Rekeda (whose testimony also applied to Tilton’s situation) established that they were paid flat daily amounts of wages which fell far short of the required prevailing wage for the numbers of hours that they worked. The credible testimony of the workers on the plumbing crew established that they worked on the McGuire AFB project and were paid nothing at all.

In contrast, the certified payrolls indicated that the employees (not including the plumbing crew) were paid at the required prevailing hourly rates for the hours that were reported to have been worked. However, when the hours reported on the certified payrolls were compared to the employees’ testimony, the certified payrolls were seen to understate the numbers of hours worked by approximately one-half. The calendar maintained by Steve Senerchia corroborates the employees’ testimony concerning the numbers of hours which they actually worked.

The certified payrolls found by the ALJ to have been falsified were signed by either Star Brite’s principal, Smilios, or the firm’s accountant/bookkeeper. However, Star Brite and Smilios remained responsible for even the certified payrolls which were not signed by Smilios. Petitioners are liable for the actions of their subordinates, such as Star Brite’s accountant/bookkeeper. *Marvin E. Hirschert, supra*; *Mark S. Harris, Inc.*, WAB Case No. 88-40, Mar. 28, 1991.

We agree with the ALJ’s conclusions that Star Brite did not compensate its employees on the McGuire AFB project at the required prevailing rates; failed to maintain accurate records; and submitted falsified certified payroll records to the contracting agency. Thus, Star Brite’s violations fell squarely within the criteria for which debarment is warranted: “Underpayment of wages and falsification of records are serious violations of law, fully justifying debarment.” *Sundex, Ltd., supra* at 7.



### 3) Alleged prejudicial delay prior to hearing

The amount of elapsed time between the significant procedural events in this matter is undisputed. The Wage and Hour Division's investigation commenced with an opening conference between the investigator and Smilios on April 8, 1993. T. 340. By October 1993, the investigation was concluded and the investigator reported his findings of violations to Smilios at a final conference. T. 556-557. The Wage and Hour Division's official notice to Star Brite charging violations was issued in May 1996 and an Order of Reference initiating proceedings before the Office of Administrative Law Judges was issued in March 1997. D. and O. at 7. As previously noted, the hearing in this case was conducted between October 22 and 24, 1997.

The ALJ viewed the matter of prejudicial delay by examining the amount of time between the "outset of the investigation" (April 1993) and the official notice of alleged violations (May 1996), a period of "some three years. . . ." *Id.* at 7-8.<sup>8/</sup> Petitioners argue that the delay at issue here is the time from the "occurrence" of the alleged violations (ostensibly when work commenced on the project in October 1992) and the time that the Order of Reference initiating the administrative hearing process was issued (March 1997); this view would measure the "delay" as approximately four and one-third years. However, we conclude that whatever period of time is chosen as being the operative factor to determine the *amount* of delay, the more important consideration is the *effect* of the delay. The ALJ likewise considered this to be the key criterion, finding that Petitioners "have failed to establish those elements of injury and/or disadvantage caused by such delay necessary for proper invocation of the doctrine of laches." D. and O. at 8.

Star Brite urges that this Board "should find that the extreme delay in this matter creates a *presumption* of improper treatment with or without the showing of palpable injury to Star Brite." Pet'r Brf. at 70. We reject this argument for the following reasons.

The WAB had several opportunities to address the questions of whether, and after how long, a delay might provide a defense against the Wage and Hour Division's pursuit of back wage and debarment liability before an ALJ. In our view, the three leading WAB cases concerning alleged prejudice stemming from delay in conducting an administrative hearing under the DBA or its related Acts are *Public Developers Corp.*, WAB Case No. 94-02, July 29, 1994, *Tom Rob, Inc.*, WAB Case No. 94-03, June 21, 1994, and *J. Slotnik Co.*, WAB Case No. 80-05, Mar. 22, 1983.

In *Slotnik*, the contractor alleged that a delay from investigation to hearing of almost four years had so prejudiced its defense that the case should have been dismissed. The WAB declined to dismiss the proceeding, ruling that in the absence of the contractor's having established a "clear showing of sufficient injury or disadvantage caused by the delay, [the WAB believed] it inappropriate to invoke a laches<sup>9/</sup> doctrine. . . ." *Id.*, slip op. at 8. The Board, did, however, further opine that

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<sup>8/</sup> The period of delay could be viewed from other perspectives, as well. The time from the close of the investigation to the official notification was approximately 30 months. The elapsed time from the official notification to the first day of hearing was approximately 18 months.

<sup>9/</sup> Laches is technically defined as "neglect to assert right or claim which, taken together with lapse of (continued...)"

“extreme delay in particular cases may create presumptions of improper treatment with or without the showing of palpable injury to the contractor under investigation.” *Id.* at 9.

The WAB next considered the question of delay acting as a bar to DBA administrative procedures in *Tom Rob*. Initially, the Board refused to consider the argument that a Fifth Amendment right to due process requires the speedy commencement of administrative proceedings conducted pursuant to the Act. However, the Board examined whether there is a right to “administrative due process” which would bar untimely administrative proceedings and concluded that there is. The WAB stated that the appropriate test “for deciding an administrative delayed justice due process claim” would be that outlined in *Barker v. Wingo*, 407 U.S. 514 (1972), as further elaborated in the case of *United States v. \$8,850*, 461 U.S. 555 (1983). The four relevant factors for consideration in determining whether a DBA administrative proceeding should be time-barred are:

1. The length of the delay;
2. The reason for the delay;
3. The defendants’ assertion of his or her rights; and
4. Prejudice to the defendants.

*Tom Rob*, *supra* at 7. Concluding that the first three factors had been shown by the contractor, the Board proceeded to rule that a respondent allegedly aggrieved by delay in a DBA administrative proceeding “must show actual prejudice, not just allege potential prejudice.” *Id.* at 9. In order to be able to demonstrate such actual prejudice, the Board reasoned that a hearing on the merits of the case was necessary and remanded the matter to the ALJ for further action.

Finally, the Board addressed similar issues of delay and prejudice in *Public Developers*. Again, the Board remanded the case to the ALJ for findings concerning the existence of actual prejudice engendered by the delay in the underlying fact-finding process. Significantly, the WAB further addressed the limitations inherent in the “presumption of prejudice” doctrine first announced in *Slotnik*. In this respect, the Board stressed that:

only the most extraordinary circumstances would warrant application of a presumption of prejudice. First, as the Board stated in *J. Slotnik*, the delay in the case must be “extreme.” Second, the Board in *J. Slotnik* properly emphasized the need to balance the interests of the employees who may be owed back wages with the interests of the employer. Thus, the application of a presumption of prejudice should

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<sup>2</sup>/(...continued)

time and other circumstances causing prejudice to adverse party, operates as bar” to prosecution of the claim or action. *Black’s Law Dictionary*, 5th Ed. (1979). In *Slotnik*, the WAB also rejected the related claims that a three-year statute of limitations – applicable, *inter alia*, to court actions initiated under the DBA – did not apply to administrative investigations and hearings conducted to determine DBA back wage and debarment liability. *Slotnik*, *supra* at 6-7.

not be seen as a device to be used in the ordinary case to relieve the employer of the obligation to demonstrate actual prejudice. Instead, the application of a presumption of prejudice should be reserved for those rare cases where, after a review of the record evidence and the parties' contentions, it appears that the egregious delay in the proceedings has operated to deprive the factfinder of the ability to determine whether the respondent has suffered actual prejudice.

*Public Developers*, *supra* at 13.

Having presented this overview of the precedent governing the finding of "administrative delay" and prejudice, we proceed to examine the merits of Star Brite's claim of prejudice. Here, there was approximately a three-year delay from the commencement of the Wage and Hour Division's investigation in April, 1993 and the sending of the notice of violation in May, 1996. Additionally, the Order of Reference commencing the administrative hearing process was not issued until March, 1997.

It is significant in this case that the ALJ conducted a hearing on the merits of the Wage and Hour Division's claims and granted Star Brite the opportunity to prove that it had experienced actual prejudice in the presentation of its defense. Citing, *Slotnik* and *Public Developers*, the ALJ specifically concluded that Star Brite had "failed to establish those elements of injury and/or disadvantage caused by such delay necessary for a proper invocation of the doctrine of laches." D. and O. at 8. We agree with this finding.

The Board has thoroughly examined Star Brite's extensive argument concerning the existence of prejudice to its defense as occasioned by the delay in this matter. *See* Pet'r Brf. at 55-70. Petitioners largely base their argument on lengthy citation to the hearing record, purporting to demonstrate that the passage of time had blurred the memories of, largely, the Administrator's witnesses, including the investigator and the employees. However, as discussed, *supra*, the testimony of the workers was largely consistent and, more importantly, was specifically found by the ALJ to be credible. Further, the mere fact that such a large number of witnesses and the investigator were available for hearing and were subject to direct and cross examination belies the existence of any prejudice to Star Brite's defense. We reject Star Brite's assertion that the record demonstrates actual prejudice because "[t]he type of evidence critical to DOL's case and the Respondent's efforts to rebut the case is testimonial evidence and it can clearly be seen that the passage of time has resulted in key government witnesses' inability to remember salient facts during their cross examinations." *Id.* at 70. To the contrary, we view the record as fully supporting the ALJ's credibility findings; simply, the salient facts were that the employees were paid less than the required prevailing rates and the certified payrolls falsely reflected that the employees were paid in compliance with the Act. Moreover, much of the probative evidence in this case as viewed by the ALJ was not even testimony; rather, it was documentary. Specifically, the certified payrolls submitted by Star Brite were at variance from the company's own internal payroll information as well as from Steve Senecheria's calendar (and the testimony of the eight employees). These two sets of documents were significant and probative evidence; Star Brite itself controlled this information at one time or another and the mere passage of time could not prejudice the defense.

Ultimately, Star Brite's argument-in-chief regarding prejudice to its defense appears to be a one sentence plea that this Board "should find that the extreme delay in this matter creates a presumption of improper treatment with or without the showing of palpable injury to Star Brite." *Id.* at 70. However, although we cannot condone the delay of almost four years leading up to the filing of the Order of Reference, neither can we conclude that the delay was so extreme as to create a presumption of prejudice. As the record demonstrates, this is not one of those "rare cases where, after a review of the record evidence and the parties' contentions, it appears that the egregious delay in the proceedings has operated to deprive the factfinder of the ability to determine whether the respondent has suffered actual prejudice." *Public Developers, supra* at 13. Petitioners concede that "the delay periods [in this matter] certainly fall within the parameters and fact patterns of [*Public Developers*] and *J. Slotnik*." *Id.* at 62. As previously noted, these are two cases where the WAB specifically refused to find a presumption of prejudice based merely on the passage of time.

In short, we reaffirm the principles recently adopted by this Board in *KP & L Electrical Contractors, Inc., et al.*, ARB Case No. 99-039, May 31, 2000. In that matter, we endorsed the WAB's reasoning in the line of cases, discussed above, which clarify the circumstances under which an administrative proceeding conducted pursuant to the Act may be dismissed where extreme delay prejudices a party's ability to present a defense to the Wage and Hour Division's allegations concerning liability for back wages and/or debarment. In *KP & L*, the respondents presented only general arguments that the mere passage of time had prejudiced their defense. However, the Board concluded that "[s]uch generalized claims of prejudice simply do not suffice." *Id.*, slip op. at 6. Similarly, in the present case, Star Brite has failed to demonstrate in any fashion that Petitioners suffered any prejudice in the preparation and presentation of a defense to the administrative charges. Accordingly, we find that there is no basis to dismiss this matter on the basis of delay in the administrative hearing process.

#### **4) The ALJ's evidentiary rulings**

Petitioners have also raised on appeal the questions of whether the ALJ erred at hearing on several evidentiary rulings, and whether the ALJ erred in the conduct of pre-hearing discovery. These errors, alleges Star Brite, so prejudiced its defense in the hearing below that this Board should reverse the findings and conclusions of the ALJ and remand this matter to the ALJ for a new hearing.

A brief summary of these alleged errors is in order. First, Star Brite alleges that it was prejudicial error for the ALJ to admit testimony – proffered by counsel for the Administrator – of Suzanne Edgars (a USAF contract specialist), John Warner (another Wage and Hour Division investigator who investigated Star Brite on another contract), and James Quinslik (a former Star Brite employee not alleged to be due back wages in this proceeding). However, whether this testimony could be deemed objectionable had the ALJ based his decision upon it is not in question here. The ALJ made no mention at all of any of these witnesses' testimony in his decision and, as discussed previously, there is ample credible and substantial evidence (specifically referenced by the ALJ) which otherwise supports the findings and conclusions that correct prevailing wages were not paid to the affected employees and that the Petitioners prepared and submitted to the contracting agency certified payrolls falsely reflecting compliance with DBA wage requirements. Thus, there was no prejudice to Star Brite occasioned by the admission of this testimony.

Next, Star Brite argues that the ALJ's receipt into evidence of two pieces of documentary evidence and a tape recording constituted prejudicial error. The first document was an interview statement prepared by the Wage and Hour Division's investigator on the McGuire AFB project. This statement was taken from employee Ken Senerchia by the investigator at the time of the investigation. PX-24. The second document was the aforementioned calendar – maintained by Steve Senerchia as Star Brite's on-site foremen and employee – which contained Senerchia's recording of the hours worked by himself and the other employees on the project. Petitioners' chief objection to these documents is apparently that they were not provided to them prior to the hearing.

Once again, however, the ALJ did not rely on PX-24, the interview statement, in his decision.<sup>10/</sup> Moreover, the interview statement merely reflected, in large part, the testimony that Ken Senerchia gave at the hearing. *Compare* T. 35 (“I was getting \$100 a day.”) *with* PX-24 (“Employee was not paid by hourly rate. He stated that he was paid \$100 per day for an eight hour day. This equates to \$12.50 per hr.”).

On the other hand, the ALJ relied upon the calendar maintained by Steve Senerchia, especially in making his findings concerning the actual hours worked by Star Brite employees and the lack of veracity in the certified payrolls. We can, however, see no prejudice to Petitioners in the fact that the calendar was not provided to them prior to the hearing. The calendar was, in the first place, Star Brite's own business record, maintained by its McGuire AFB foreman (Steve Senerchia) and used by him to report the weekly hours worked to Star Brite's business office.<sup>11/</sup> Thus, even an objection to the calendar as hearsay would fail. 29 C.F.R. §18.803(6) (excepting records maintained “in the course of a regularly conducted business activity” from the general rule against admission of hearsay evidence). *See also, Howell Construction, Inc.*, *supra*; *M.C. Lazzinnaro Construction Corp.*, WAB Case No. 88-08, Mar. 11, 1991. Finally, we also conclude that the record does not demonstrate any actual prejudice to Star Brite from admission of Steve Senerchia's calendar. The ALJ afforded Star Brite the opportunity to challenge the calendar in a post-hearing submission; however, to date Petitioners have failed to point to any prejudicial effect from either the admission of the calendar as an exhibit or the Administrator's failure to provide the calendar prior to the hearing.

We view the tape recording to which Star Brite objects as being similar to the testimony and the employee interview statement to which Petitioners objected. The ALJ did not cite the recording in his decision as a basis for finding the DBA wage and certified payroll violations and, therefore, the tape recording presented no possible prejudice to Petitioners' case that we can discern.

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<sup>10/</sup> In any event, it is not likely that the Ken Senecheria's interview statement could have legally been disclosed prior to the hearing. The regulation at 29 C.F.R. §6.5 provides that:

In no event shall a statement taken in confidence by the Department of Labor or another Federal agency be ordered to be produced prior to the date of testimony at trial of the person whose statement is at issue unless the consent of such person has been obtained.

<sup>11/</sup> Star Brite must be deemed to have been aware of the calendar's existence given that Petitioners' contract supervisor, Gus Poiniros, also knew that Steve Senecheria maintained it. T. at 80-82.

Finally, Star Brite raises an objection to the fact that the ALJ permitted two witnesses, Quinslik and Warner, to testify about certain documents that were never received into evidence. Petitioners argue that the mere fact that the ALJ heard such testimony about excluded documents was prejudicial. We disagree because the ALJ did not rely on this testimony in his decision. The documents, having not been admitted, formed no part of the basis for the ALJ's decision.

When examining questions of possible error committed by a trier of fact in the handling of evidence, the Board must emphasize that, in general, an ALJ has broad discretion in the types and quality of evidence which is admitted at hearing. Sweeping authority accorded an ALJ in the conduct of hearings is specified in the regulations governing proceedings conducted before the Department of Labor's Office of Administrative Law Judges. *See* 29 C.F.R. §18.29. Based on our review of the record before us, we conclude that the ALJ did not abuse his discretion in the conduct of the hearing.

### ORDER

The ALJ's March 5, 1998 D. and O. finding Petitioners liable for \$15,290.43 in back wages and directing placement of the names of Star Brite Construction Company, Inc. and Kostas Smilios on the list of parties ineligible to receive federal contracts and subcontracts for a period of three years is affirmed. The Petition for Review is **DENIED**. It is hereby **ORDERED**:

- 1) That Petitioners shall pay the following DBA back wages to the following persons who worked on the McGuire AFB contract:
  - a) Graef \$1,264.82
  - b) Ferrin 343.53
  - c) Rekada 104.92
  - d) Schenkel 843.21
  - e) Senerchia, Ken 4,526.40
  - f) Senerchia, Steve 6,853.43
  - g) Tencza 1,249.20
  - h) Tilton 104.92

2. That the Administrator shall transmit the names of Petitioners Star Brite Construction Company, Inc. and Kostas Smilios to the Comptroller General of the United States for placement on the list of persons and firms ineligible to receive federal contracts or subcontracts for a period of three years.

**SO ORDERED.**

**PAUL GREENBERG**

Chair

**E. COOPER BROWN**

Member

**CYNTHIA L. ATTWOOD**

Member